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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 DARREL C. OLDS,

10 Petitioner,

11 v.

12 JEFF UTTECHT.

13 Respondent.

14 CASE NO. 11-5046BHS

15 REPORT AND
16 RECOMMENDATION

17 NOTED FOR: AUGUST 12, 2011

18 The underlying petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254

19 has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28

20 U.S.C. § 636(b)(1)(A) and (B), and Local Magistrate Judge Rules MJR3 and MJR4.

21 This court previously submitted a Report and Recommendation that this matter
22 be dismissed with prejudice because it was time-barred (ECF No. 20). Petitioner has
23 since filed a motion asking that his petition be dismissed without prejudice (ECF No.
24 28). Respondent opposes the motion (ECF No. 29). Respondent argues that because
25 the petition is time barred and would be second or successive in state court and the
26 petitioner cannot return to state court, dismissal without prejudice is not warranted. The
27 court agrees and recommends that the original Report and Recommendation, (ECF No.
28 20) be adopted.

1 Respondent moved to dismiss this action (ECF No. 16). The court issued a
2 Report and Recommendation to dismiss the petition as time barred (ECF No. 20).
3 Petitioner then filed a “supplemental briefing” asking that he be allowed to raise
4 additional grounds for relief (ECF No. 21). Petitioner also filed objections to the
5 Report and Recommendation (ECF No. 23). The matter was referred back to this court
6 (ECF No. 25).

7 The court entered an order denying the motion to amend because the issues
8 petitioner was trying to raise are time barred by many years. The issues relate to his
9 original conviction in 1984 (ECF No. 26). The matter was referred back to Judge Settle
10 for consideration of the original Report and Recommendation (ECF No. 26).

12 The court has considered the objections to the original Report and
13 Recommendation (ECF No. 23). Judge Strombom recommended dismissal without
14 prejudice in 2008 in cause number 08-cv-5612FDB/KLS. Petitioner was attempting to
15 raise twelve unexhausted issues. He was given the chance to exhaust his claims in state
16 court and the state court dismissed them as “frivolous” (ECF No. 16, Exhibit 15).

17 The claims were time barred under 28 U.S.C. 2244 (d) -- even in 2008.
18 Petitioner was attempting to challenge a 2006 parole decision. He had one year to do
19 so. He was eleven months time barred when he filed under cause number 08-cv-5621.

21 Petitioner now asks the court to dismiss the petition so he can again raise his
22 claims in state court. Petitioner is barred from returning to state court as any further
23 petition will be second or successive and procedurally barred under state law. The

1 court, therefore, recommends that the original Report and Recommendation be adopted
2 and this action dismissed with prejudice.

CERTIFICATE OF APPEALABILITY

A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district court’s dismissal of the federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A certificate of appealability may issue only if a petitioner has made “a substantial showing of the denial of a constitutional right.” See 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.”

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of de novo review by the District Court Judge. See, 28 U.S.C. 636 (b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on August 12, 2011, as noted in the caption.

Dated this 13th day of July, 2011.

J. K. Ward Creative

J. Richard Creature
United States Magistrate Judge